

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES OF AMERICA
v.
CLAY COOKE, PETITIONER } No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

The petitioner, Clay Cooke, is an attorney of the State of Texas, whose client, one J. L. Walker, was a litigant in several matters pending at the time herein mentioned in the District Court of the United States for the Northern District of Texas, before the Honorable James C. Wilson, a judge of that court. Certain of these matters had proceeded to judgment, in which motions for new trials were pending, and the others had not yet come on for hearing. Of the matters heard, the trial of one, referred to in the record as No. 984, had been completed by verdict of the jury on February 15, 1923, at 5.30 p. m. At 11.15 a. m. of the succeeding day, February 16, 1923, while a case

ARGUMENT**Petitioner was guilty of contempt**

Section 725, R. S., provides as to the power of the Federal courts in connection with the offense of contempt of court, that:

The said Courts shall have power to impose and administer all necessary oaths, and to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases, except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

This Act is not the source, of course, of the power of the Federal courts to punish contempts. It but restricts their inherent power. Under it they can only punish as contempt "the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice."

Was petitioner's act in writing and delivering this letter "misbehavior" and, if so, was that misbehavior in the "presence of the Court"?

Answering the second part of this question first, we say that unquestionably under the authority of *In re Savin, Petitioner*, 131 U. S. 267, the delivery of this letter to Judge Wilson in his chambers during a brief recess in a trial then going on was an act done "in the presence of the court" within the meaning of Section 725. The Court of Appeals so

held (R. 54 and 55) and we observe that petitioner does not in his brief contend that what was done was not done "in the presence of the court."

Was petitioner's act "misbehavior?" We answer, it was clearly. "Misbehavior" is defined as "improper, rude, or uncivil behavior; ill conduct; misconduct." (Webster's New International Dictionary.) The word is here used in this ordinary sense. Such "misbehavior," committed in the presence of the court, was always punishable as contempt.

To say to the court in writing, as the petitioner here did, that in a case just ended and in which a motion for a new trial was pending, he had proved himself not big enough and not broad enough to restrain his bias and prejudice against a litigant, that in his conduct of the trial he had manifested such prejudice and bias, and that he was possessed of this prejudice and bias against the litigant because he had permitted slanders to be whispered in his ears, to say to the court that the petitioner's hopes that the court would conduct himself as a judge should had been shattered by the judge's conduct and not only shattered but rudely shattered, to say all of these things, and in substance they were all said in the petitioner's letter, was patently to offer insult to the court and to openly impeach his honor both as judge and man. It was "misbehavior" within any possible meaning of that word.

Being committed in "the presence of the court," it was punishable contempt.

Certainly it is no defense to say that there were parts of the letter that were not improper, or that much of it might lawfully have been incorporated in an affidavit to disqualify the judge in cases not yet tried. All that may freely be conceded. There remains the offending language which had no reference to the cases yet for trial but referred solely to the case still pending on motion for new trial.

If that language had been spoken orally in the face of any court while in session in the discharge of public duty and bearing upon a matter still pending, it would have brought swift, summary, and just punishment. Should the case stand otherwise because the insult was not spoken but handed to the judge in writing and not as he sat upon the bench but when he had stepped down during a moment's intermission? Very clearly, we believe, these questions must be answered in the negative.

Petitioner was accorded a fair hearing

Says petitioner in his brief, even if the delivery of this letter was contempt of court and as such deserving punishment, my conviction was obtained without due process of law and that in eight particulars. These are discussed in the brief of the petitioner on pages 20 to 45, inclusive. Briefly, we notice each.

Particular (a), page 20 of the brief, is that the writ of attachment was not supported by "oath or affirmation" and hence violated Article IV of the Amendments to the Constitution which provides: "The right of the people to be secure in their persons * * * against unreasonable seizure shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, etc." To this particular we answer: 1st, the word "warrant" as used in the Amendment has never been held to include an attachment to answer for contempt of court. Petitioner cites no case so construing it. 2nd, it has been repeatedly held that in case of a direct contempt, that is a contempt committed as this one was in the presence of the court, neither affidavit, notice, rule to show cause, or other process is a necessary prerequisite to the court's jurisdiction to punish the contempt. *In re Terry*, 128 U. S. 29, 307; 13 C. J. 63. 3rd, the petitioner waived any objection to the basis of the attachment by pleading orally and in writing to the charge upon the merits. 4th, this objection is contained in none of the assignments of error. (R. 21 et seq.)

In support of this particular petitioner cites *Phillips S. & T. Co. v. Amalgamated Ass'n*, 208 Fed. 335, and *Sona v. Aluminum Castings Co.*, 214 Fed. 936, neither of which was a case of direct contempt committed in the presence of the court. Each was a contempt proceeding instituted by the injured party for failure to obey an injunction.

They are so clearly distinguishable as to constitute no support whatever for petitioner's contention.

Particular (b), page 21 of the brief, is that no offense is charged against the United States. Reference is made to the statute, R. S. 725, authorizing punishment as for contempt of "misbehaviors committed in the presence of the court or so near thereto as to obstruct the administration of justice." Petitioner says "the purported charge does not state by any *positive* averment that the writing of said letter obstructed the administration of justice." To this we answer: 1st; no formal charge whatever was necessary in case of a contempt committed in the presence of the court. (Authorities supra.) 2nd; the statute does not require that the "misbehavior," if committed in the presence of the court, must *also* be of such character as to "obstruct the administration of justice." That qualification is required only as to misbehavior not committed "in the presence of the court." 3rd; as to this particular also, if ever of any merit, it was waived by the petitioner's pleading to the charge and by its omission from the assignment of errors.

The cases cited in support of this particular are *Ex parte Hudgins*, 249 U. S. 378 and *Ex parte Craig*, 274 Fed. 177. They do not support the contention for which they are cited. On the contrary, in the *Hudgins case* it is expressly stated, 1 c. 383, that "*the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of*

accusation and methods of trial generally safeguarding the rights of the citizen." The *Hudgins* case does indeed assert that "an obstruction to the performance of judicial duty" is an essential element of contempt and "that the presence of that element must be clearly shown," but that it must be specifically charged it does not hold. Moreover, it was not a case where insulting language was offered to the court. What the court said must be construed in the light of the facts of the case. So construed, the language used does not mean that "misbehavior" in the form of insult to the presiding judge in the presence of the court is not contempt unless it necessarily also obstructs justice. The distinction is, however, not important here since, as the court below pointed out in its opinion, the necessary tendency of such contemptuous language as the petitioner here employed was to prevent a free and calm disposition of pending matters.

In connection with this thought it is as well here as elsewhere to refer to petitioner's intimation on pages 63, 64, and 65 of his brief that the language used in his letter would not have disturbed the judicial equilibrium of a judge "of ordinary firmness of character." "To hold" that what was said in the letter would obstruct the administration of justice "would be to hold the judge to be of very weak character indeed," so petitioner maintains. But it is sufficient to point out that a like argument would justify any conceivable indignity offered to

a court. It is scarcely a defense to insulting language to assert that the court should have been sufficiently superhuman as not to have felt its sting.

Ex parte Craig, the second of the cases cited in support of particular (b), was one of constructive contempt, if any, as distinguished from one of direct contempt, committed in the presence of the court. The importance of that distinction is pointed out. 274 Fed. 1. c. 185. The case is of little value here. It holds merely, what no one questions, that as to a contempt committed outside the presence of the court, it must be such as obstructs justice. That is the plain language of the statute. The case then holds that the language used was not calculated to produce that consequence.

In connection with the *Craig case* we call attention to this language of the court therein, l. c. 187. "*The misbehavior* (referring to what 'misbehavior' constitutes contempt) *must present an interruption which comes between the Court and the consideration of the subject-matter then under submission in some way as to distract the mind of the court and pervert the course of justice, or even to divide the attention of the court.*" The definition seems good. It does not help petitioner. It is difficult to imagine language more likely than that used in the letter in this case to distract the mind of the court in reference to the pending matter. And as to whether a matter is still pending the *Craig case* says, l. c. 187: "*A cause is pending when it is*

still open to modifications, appeal, or rehearing and until the final judgment is rendered."

Particular (c), page 22 of the brief, asserts that petitioner was not informed of the nature and cause of the accusation. Reference is made to Article IV of the Amendments to the Constitution, providing that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation." But this is one of those constitutional limitations which this court said in the *Hudgins* case, supra, did not apply to a contempt committed "in the presence of the court." Moreover, the record clearly shows that in truth and fact the petitioner was fully informed as to the charge against him before he undertook to state his defense. None of the six cases cited in support of this particular on page 24 of petitioner's brief either holds or even distantly suggests that in a case of direct contempt committed in the presence of the court a formal paper must be served upon the accused party setting out the nature of his offense before he can be punished for the contempt.

Article VI of the Amendments to the Constitution, relating to the right of counsel in all criminal prosecutions, is invoked as the basis for particular (d), page 24 of the brief, but the inapplicability of this Amendment, with its several guarantees, including that of trial by jury, to a proceeding for the summary punishment of contempt in the presence of the court is so well recognized that discuss-

sion of it is idle. Petitioner has found or at least has cited no case to support his contention here.

Particular (e), page 28 of the brief, assumes without citing any supporting authority (the cases referred to on page 35 do not suggest such a principle) that one charged with a direct contempt committed in the presence of the court has the right to plead formally to the charge. Of course he has no such right. Here again the *Hudgins* case is in point and decisive. The petitioner was accorded every right to which in law and justice he was entitled. If he had orally spoken the insulting language in the presence and in the face of the court he would have been entitled to no hearing of any kind. Similarly he would have been entitled to none had he personally delivered the letter to the judge. Then all the facts would have been within the knowledge of the court and the law of contempt does not require the absurdity of a hearing to establish the existence of facts occurring in the court's presence. Must the judge be sworn to testify?

The most petitioner was entitled to was opportunity to deny authorship of the offending letter, since it was delivered by the hand of another although in his presence. But he admitted authorship. There was nothing that might have been proper subject matter of any further hearing. Such hearing as he was entitled to he had.

Particular (f), page 36 of the brief, again relies on the inapplicable Sixth Amendment to the Constitution.

Particular (g) is not directed at the hearing before the District Court but at an alleged alteration of the record after the appeal to the Circuit Court of Appeals. More specifically, the complaint is the failure of the District Court to send up a so-called answer which was not filed until after writ of error had been allowed. It was filed or offered for filing on March 9, 1923. (R. 17.) The writ of error was allowed on February 26, 1923. (R. 18.) Certainly the petitioner was deprived of no legal right by any failure to transmit to the Circuit Court of Appeals what purported to be an answer admittedly offered for filing after writ of error had been allowed.

As for particular (h), page 40 of the brief, to the effect that the punishment imposed was not for the letter but on another account, it is wholly unwarranted in view of the record and especially of the Court's formal statement of Facts and Judgment. (R. 5 to 8, inclusive.) Certainly this Court will not say, against the solemn record of the District Court as to the thing charged and found to be contempt, for which petitioner was sentenced, that in reality he was punished for some other offense. Certainly no such conclusion would be justified by the mere fact that the Court in sentencing petitioner criticised other conduct of petitioner and his client.

CONCLUSION

The letter written to Judge Wilson and handed to him under the circumstances shown by this record was a contempt committed in the presence of the court. If it was not, then, of course, the decision below should be reversed outright. In our view it was unquestionably contempt. As to the hearing, it should have been and was summary. Guilt was in effect admitted. In what way was petitioner injured by any omission in connection with the hearing? Even now, in his long brief, he suggests no defense, except that he might have shown his reputation as a lawyer and, as an extenuation, the carelessness with which the letter was prepared. But these are no defenses. There is no justification, therefore, we think, for a remanding of the case. The decision below was right. We respectfully submit it should be affirmed.

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MARCH, 1925.